

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-213041

DATE: March 19, 1984

MATTER OF: Dragon Services, Inc.

DIGEST:

1. A solicitation is ambiguous only if two or more reasonable interpretations of its provisions are possible. Where the plain meaning of the solicitation's language permits only one reasonable interpretation, a protest alleging the existence of an ambiguity in the solicitation is denied.
2. The contracting agency has the primary responsibility for drafting specifications which reflect the minimum needs of the government. Protester's complaint that the agency's required manpower levels for full food services were set too high is rejected where the protester fails to show the lack of a reasonable basis for the agency's determination that the stipulated levels are necessary to meet its needs.
3. Protest that other bids are too low to permit compliance with the solicitation's minimum manning requirements is denied. Rejection of a bid as too low requires the agency to find the bidder nonresponsive, and GAO does not review affirmative determinations of responsibility absent a showing of possible fraud or bad faith on the part of procuring officials or the misapplication of a definitive responsibility criteria, circumstances not present here.

Dragon Services, Inc. protests the terms of invitation for bids (IFB) No. DABT31-83-B-0068, a small business set-aside issued by the Department of the Army for full food services at Fort Leonard Wood, Missouri. Dragon also contends that four bids lower than its own are nonresponsive. We deny the protest.

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According to Dragon, the specifications contained in the solicitation are ambiguous as to whether the contractor or the government is required to furnish certain operating equipment such as dishes, pots, knives, forks and spoons. In response, the Army states that Dragon, the incumbent, is performing under identical contract provisions and that its protest allegations are raised merely to disrupt the procurement and thereby gain further extensions of its existing contract. The contracting officer states the solicitation is clear and unambiguous concerning contractor-furnished equipment. For example, the contracting officer points to the specification provision describing the scope of the contract, which states that "[t]he contractor shall provide all . . . supplies and materials. . . ." The contracting officer also notes that paragraph 4 of the invitation's statement of work, which concerns contractor-furnished equipment, supplies and maintenance items, includes in subparagraph 4-2 "[a]ll operating supplies listed in Exhibit 5 and any other supplies necessary to meet contract requirements." Exhibit 5 lists 138 items, including: bowls, china, glasses, french knives, curved steak knives, table knives, tablespoons, table forks, teaspoons and trays.

We agree with the Army that the solicitation is clear. The mere allegation that something is ambiguous does not make it so. An ambiguity exists only if two or more reasonable interpretations are possible. Atterton Painting, Inc., B-208088, January 18, 1983, 83-1 CPD 60. Thus, the inquiry here is whether the specifications cause such uncertainty that one might reasonably believe that operating equipment was to be government-furnished under the specifications of this full service solicitation. We find Dragon's contention of ambiguity untenable in view of the specification language noted above. The plain meaning of those provisions is that the furnishing of operating equipment would be the responsibility of the contractor. Accordingly, we do not find the solicitation ambiguous in this regard.

Next, Dragon complains about the Army's minimum manpower requirements for the furnishing of food services. The solicitation explicitly requires a minimum number of labor hours for each dining facility, including minimum labor hours for clerks, bakers and dining facility attendants. The protester believes that the minimum manpower requirements unnecessarily add to the cost of contract performance. According to Dragon, it has

satisfactorily performed its contract without any specified manpower requirements. Dragon states that it employs good management and supervision, which apparently consists of giving employees "off the clock" breaks for extended periods during the day when the work to be performed is at non-peak levels. According to Dragon, this practice has permitted the firm to be competitive and cost efficient. Dragon suggests that standard contract quality control provisions adequately insure acceptable performance levels.

Further, Dragon disputes the validity of the Army's estimates concerning its manpower needs, arguing that the Army has failed to conduct any objective evaluation or historical analysis of its needs. Dragon contends that the Army relied solely on staffing levels contained in a noncompetitive proposal by a firm that unsuccessfully negotiated with the Army for the award of this requirement under the Small Business Administration's section 8(a) program, which authorizes subcontract awards to socially and economically disadvantaged small business concerns. Dragon states that the Army should have used the historical experience of Dragon, the incumbent contractor, in formulating its minimum needs. According to Dragon, the Army, by failing to do so, lacks a reasonable basis for the solicitation's manpower requirements.

In response, the Army states that it estimates 619,243 hours, exclusive of bakers and clerks, as the total number of minimum hours required by the solicitation each year for the performance of the work. This compares to 659,061 hours, on a yearly basis, which Dragon and the Army agreed upon as the necessary manpower requirements in negotiating an extension of Dragon's current contract. While the Army recognizes that the manpower requirements negotiated with Dragon reflect dining facility use based on greater-than-normal troop strength for the summer months, it nevertheless maintains that the minimum manpower requirements are a valid and close approximation of its minimum needs.

Army also argues that it reasonably concluded that Dragon's contract performance was unsatisfactory and unacceptable, and therefore not a proper measure of required manning levels. According to the Army, Dragon's management practice of dictating "breaks" for hourly workers resulted in union complaints to the Federal Mediation and Conciliation Service, adverse publicity concerning labor dissatisfaction on local radio and in the newspapers, congressional complaints, and labor complaints

to the National Labor Relations Board. In addition, the Army has provided our Office a thick packet of deficient performance reports concerning Dragon's unsatisfactory performance, which the Army primarily attributes to undermanning.

Further, the Army states that even though its manpower estimates were originally taken from a section 8(a) proposal, the figures themselves represent the reasoned consideration and judgment of the Chief, Services Division, Directorate of Industrial Operations, who has authority and overall responsibility for directing, coordinating and controlling the logistic service of providing food service support at Fort Leonard Wood. Finally, the Army points out that several bid prices were received under the current solicitation which were lower than the price at which Dragon was awarded its previous contract without specified manpower requirements.

The responsibility for drafting specifications which reflect the minimum needs of the government is primarily that of the contracting agency, and we therefore will not question specifications in the absence of a showing that they do not reflect the agency's minimum needs. Low Bid Janitorial Service, B-180662, June 25, 1974, 74-1 CPD 342. We think that the Army reasonably disregarded Dragon's manning levels in formulating its needs under the present solicitation in view of the serious labor problems created by Dragon's employment practices. While Dragon disputes the seriousness of these labor complaints, we have received a letter from the employees' union specifying the serious labor troubles experienced at Fort Leonard Wood, including several threatened strikes and picketing, solely because of Dragon's management practices. The Army's actual formulation otherwise has not been shown to be unreasonable. In our view, then, the manning levels of the solicitation have not been shown to be other than the reasoned judgment of the agency's food service technical expert, with which Dragon has shown no more than mere disagreement. This does not provide us a basis for questioning the solicitation's manning levels.

Further, concerning Dragon's dislike for minimum manpower requirements because of their alleged anti-competitive impact, our Office has previously found the use of minimum manning requirements in advertised procurements to be permissible. See Palmetto Enterprises, Inc., et al., B-193843; B-193843.2; B-193843.3, August 2, 1979, 79-2 CPD 74. In the absence of evidence clearly

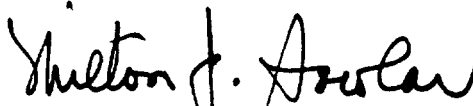
establishing a substantial adverse impact on competition, we see no reason to question the Army's use of minimum manning requirements the agency believes are needed to ensure adequate service.

Next, Dragon alleges that the bids of four other bidders should be declared nonresponsive since the bid prices allegedly are too low to reflect the minimum manning requirements set forth in the solicitation. Dragon argues that this is not a case of below-cost bids since the bidders are small business concerns which do not have the financial resources to bid below cost.

However, even where the solicitation contains minimum manning requirements, any proper rejection of a bid as too low requires a determination that the bidder is nonresponsive. See Complete Building Maintenance Co., Inc., B-205512, December 8, 1981, 81-2 CPD 451. Here, the award of the contract to any of the four bidders would constitute an affirmative determination of the awardee's responsibility. Id. This Office does not review protests against affirmative determinations of responsibility unless there is a showing of possible fraud or bad faith on the part of procuring officials or that the solicitation contains definitive responsibility criteria which the procuring officials failed to apply. Domar Industries Co., Inc., B-202735, September 4, 1981, 81-2 CPD 199. Neither exception is applicable here.

Finally, Dragon alleges that the low bidder nevertheless is nonresponsive. However, we understand that the low bidder was found nonresponsive, and subsequently failed to secure a certificate of competency from the Small Business Administration. The firm thereby was rendered ineligible for award. Accordingly, this issue is academic.

The protest is denied.

for 
Comptroller General
of the United States